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No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is the lower court's holding, that the Due Process Clause requires state jury instructions in a murder case to permit the jury to consider the lesser offense of voluntary manslaughter where warranted by state law, a new rule under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The February 2, 1987, unpublished decision of the Illinois Appellate Court affirming Taylor's conviction on direct appeal appears in the appendix to the Petition for Certiorari [hereinafter Pet. App.] at 35. The March 31, 1989, decision of the Illinois Appellate Court, affirming the denial of Taylor's petition for post-conviction relief under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶¶ 122-1 *et seq.* (1985), is published at 181 Ill. App. 3d 538, 536 N.E.2d 1312 (4th Dist. 1989), and is reprinted in the appendix to the Petition for Certiorari

at 40. The December 19, 1990, unpublished decision of the United States District Court for the Central District of Illinois, which denied Taylor habeas corpus relief on retroactivity grounds, is reprinted in the appendix to the Petition for Certiorari at 26. The January 21, 1992, decision of the United States Court of Appeals for the Seventh Circuit is reported at 954 F.2d 441 (7th Cir. 1992), and is reprinted in the appendix to the Petition for Certiorari at 1.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on January 21, 1992. On April 14, 1992, Justice Stevens granted the Petitioner's motion for an extension of time to file the Petition for Certiorari from April 20, 1992, to and including April 27, 1992. The Petitioner filed the Petition on April 27, 1992. On October 5, 1992, this Court granted the Petition limited to Question 1 presented by the Petition. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(c) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue the Fourteenth Amendment's Due Process Clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The case also puts in issue 28 U.S.C. § 2254(a) (1988): "The Supreme Court, a Justice, thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

STATEMENT OF THE CASE

I. The Homicide

On September 13, 1985, Joyce Taylor put her daughter Katie to bed and went to bed herself just after 9:00 p.m. (J.A. 11). Her boyfriend, Scott Siniscalchi, who also lived in the apartment, went to bed at that time as well. (J.A. 11). Joyce went to bed early because she had to arise very early the next morning for work. (J.A. 13).

Just before 1:00 a.m., Kevin Taylor, Joyce's ex-husband, called the apartment and Joyce answered. (J.A. 11). They talked for a few moments until Joyce explained that she had to go back to bed because she had to work an early shift the next day. (J.A. 12-13). Kevin then asked her if she was "still with Scot [sic]." (J.A. 12). She said that she was and repeated that she had to get some sleep. (J.A. 13). Kevin accused her of being rude and hung up the phone. (J.A. 13).

A few minutes later the phone rang again. (J.A. 13). Joyce thought it would be Kevin again, so she asked Scott to answer the phone. (J.A. 13). Kevin asked to talk to Joyce. (J.A. 14). Scott told Kevin to leave Joyce alone. (J.A. 14). The conversation lasted less than one minute, and Scott and Joyce then went back to sleep. (J.A. 14).

Joyce and Scott next awoke about forty-five minutes later to the sound of Kevin kicking their door in. (J.A. 14; Transcript, [hereinafter Tr.] vol., XII, at 108). Kevin had broken into the apartment despite the three locks on the door. (J.A. 22). He appeared at the entrance to the bedroom and walked toward the bed. (J.A. 14, 16). Kevin climbed onto the bed; Scott and Joyce backed up against the wall. (J.A. 17). He ordered them to "[s]tay right there; don't move," and reached behind him to pull out a large hunting knife that he had brought with him from his car. (J.A. 17, 79). Kevin had a calm voice and appeared to know what he was doing. (J.A. 17).

Joyce and Scott both pleaded with Kevin, but Kevin climbed onto Scott with the knife. (J.A. 17). Scott and Kevin struggled as Joyce crawled off the bed to go to the phone. (J.A. 18). As she approached the phone, she heard Scott exclaim, "The knife's in me Joyce; the knife's in me." (J.A. 18).

Scott and Kevin came into the living room. (J.A. 19). Scott was covered with blood. (J.A. 19). As Joyce ran to the phone, Kevin said, "You don't want to do that" and "I love you." (J.A. 19). He then ripped the phone out of the wall. (J.A. 19). Joyce grabbed her daughter and ran out of the apartment. (J.A. 19). As she left, she saw Kevin kick or knee Scott in the abdomen. (J.A. 20). Scott would soon die from a massive external hemorrhage caused by seven stab wounds. (J.A. 44).

While Joyce was at a neighbor's door downstairs, Kevin ran past her and out the front door of the building. (J.A. 20). After Kevin left the building, he slammed the front door and ran toward his car. (J.A. 20; Tr. vol. XII, at 109, 112-13). He had parked his car down the street rather than in front of Joyce's and Scott's apartment. (J.A. 88). Kevin then drove his car back to his home. On the way,

he stripped off all his clothes and threw them in a trash can. (J.A. 91). He also threw away the hunting knife that he used to kill Scott. (J.A. 92).

When he arrived at his home, he put some of his own blood on a paring knife and told the police that he had cut himself; he intended to create false evidence and lie to the police about a cut on his arm. (J.A. 92-93). Kevin admitted at trial that he broke into the apartment armed with the hunting knife. (J.A. 87-88). He also alleged at trial that he only went to the apartment that night to pick up his daughter. (J.A. 87). He never mentioned Katie to the police that night, however. (J.A. 93).

Kevin had repeatedly threatened to kill Scott in the past. For example, in January, 1985, Joyce was at her mother's home when Kevin kept calling her late at night and threatening her. (J.A. 23). Joyce called the police. (J.A. 23). Kevin called again after a police officer had arrived, and the officer listened to the call on another extension. They both heard Kevin proclaim that "someday he was going to get [Scott]. He was going to kill him someday." (J.A. 24, 45). In addition, Joyce's mother testified that in the summer of 1985 Kevin told her: "I'm going to get Scot [sic] someday. It might take a while but I'll get him." (J.A. 42).

II. The Murder Trial and Taylor's Direct Appeal

The People of the State of Illinois indicted Taylor for the murder[1] of Scott Siniscalchi and for home inva-

---

[1] Illinois law defined murder at the time as follows:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(Footnote continued on following page)

sion.[2] After the People concluded their case at trial, the court held the first jury instruction conference. The prosecution proffered a murder instruction that mirrored the Illinois pattern instructions.[3] The instruction required the prosecution to prove, beyond a reasonable doubt, the ele-

[1] *continued*

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Illinois Criminal Code of 1961 [hereinafter ICC] § 9-1(a), Ill. Rev. Stat. ch. 38, ¶ 9-1(a) (1985). Upon conviction, a court could sentence a murderer from twenty to forty years. Unified Code of Corrections [hereinafter UCC] § 5-8-1(a)(1)(a), Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(1)(a) (1985).

[2] Illinois law defined home invasion as follows:

A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present and

(1) While armed with a dangerous weapon uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

(2) Intentionally causes any injury to any person or persons within such dwelling place.

ICC § 12-11(a), Ill. Rev. Stat. ch. 38, ¶ 12-11(a) (1985). Home invasion triggered a sentence of six to thirty years. ICC § 12-11(b), Ill. Rev. Stat. ch. 38, ¶ 12-11(b) (1985); UCC § 5-8-1(a)(3), Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(3) (1985).

[3] Illinois Sup. Ct. Comm. on Pattern Jury Instructions in Criminal Cases, *Illinois Pattern Jury Instructions—Criminal* §§ 7.01 & 7.02, at 57-59 (2d ed. 1981) [hereinafter IPI]. All the relevant instructions actually given at Taylor's trial are reproduced in the joint appendix at 128-131.

ments of the crime of murder: (1) that Taylor performed the acts that caused Scott's death and (2) that Taylor either intended to kill or cause great bodily harm, knew that his acts would cause death or great bodily harm, knew that his acts created a strong possibility of death or great bodily harm or was committing the offense of home invasion. (J.A. 51, 128-29). Taylor's counsel noted that the instruction was from the Illinois pattern instruction book and stated that he had no objection to it. (J.A. 51).

After Taylor put on his case, the court held another jury instruction conference to address instructions proffered by the defense. Taylor's counsel asked the court to instruct the jury on voluntary manslaughter, which provided a lesser penalty than murder if the killer acted out of sudden and intense passion caused by serious provocation. (J.A. 93).[4] The prosecutor objected, arguing that Taylor had not put on any evidence to support voluntary manslaughter. (J.A. 93-95).

[4] Illinois law defined voluntary manslaughter, in relevant part, as follows:

A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

ICC § 9-2(a), Ill. Rev. Stat. ch. 38, ¶ 9-2(a) (1985). Voluntary manslaughter carried a sentence of four to fifteen years. ICC § 9-2(c), Ill. Rev. Stat. ch. 38, ¶ 9-2(c) (1985); UCC § 5-8-1(a)(4), Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(4) (1985).

The court overruled the prosecutor's objection and agreed to instruct the jury on voluntary manslaughter. Taylor's counsel tendered an instruction on voluntary manslaughter that followed the Illinois pattern instruction with one slight modification. (J.A. 96).[5] The instruction required, to sustain a charge of voluntary manslaughter, that the "evidence prove" the two elements of murder noted above and that Taylor acted under a sudden and intense passion resulting from serious provocation. (J.A. 96, 130).

---

[5] The pattern instruction read in relevant part:

> To sustain the charge of voluntary manslaughter, the State must prove the following propositions:
>
> *First*: That the defendant performed the acts which caused the death of _____; and
>
> *Second*: That when the defendant did so,
>
> [1] he intended to kill or do great bodily harm to _____;
>
> or
>
> [2] he knew that such acts would cause death or great bodily harm to _____;
>
> or
>
> [3] he knew that such acts created a strong probability of death or great bodily harm to _____; and
>
> *Third*: That when the defendant did so,
>
> [1] he acted under a sudden and intense passion resulting from serious provocation by another;
>
> or
>
> [2] he acted under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed _____.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

IPI § 7.04, at 62.

Before closing arguments, the prosecutor asked the court, on his own motion and without any request by Taylor's counsel, to amend the murder instruction. He asked the court to instruct the jury that the *prosecution* must prove beyond a reasonable doubt, as part of its murder case, that Taylor did *not* act under a sudden and intense passion resulting from serious provocation. (J.A. 97-101). The prosecutor requested this instruction even though it made his case more difficult because he believed that the Illinois Appellate Court's recent decision in *People v. Bolden*, 132 Ill. App. 3d 1047, 477 N.E.2d 1380 (Ill. App. Ct. 4th Dist.), *appeal denied*, 108 Ill. 2d 574 (1985), required it. (J.A. 97-101). The court refused to instruct the jury as the prosecutor requested despite *Bolden* and despite Taylor's failure to object, however, saying that he would "give the Appellate Court another shot at it." (J.A. 101).

After deliberating for one hour and twenty minutes, the jury returned a verdict of guilty of murder and guilty of home invasion. (J.A. 131). The court sentenced Taylor to thirty-five years in prison on the murder conviction. (J.A. 133).

Taylor appealed to the Illinois Appellate Court and argued, citing *Bolden* as the prosecutor had at trial, that the murder instruction should have required the People to prove beyond a reasonable doubt that Taylor did not act under a sudden and intense passion caused by serious provocation. (Pet. App. 37). The Illinois Appellate Court affirmed in an unpublished order, finding that Taylor had waived this issue by not joining the prosecution's request for the "*Bolden* instruction" at trial. (Pet. App. 37-38). The Illinois Supreme Court denied Taylor's petition for leave to appeal on June 4, 1987, and Taylor did not petition this Court for a writ of certiorari.

III. The Illinois Post-Conviction Proceeding

Taylor filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶¶ 122-1 *et seq.* (1985), arguing that he was denied effective assistance of counsel in violation of the Sixth Amendment because his trial lawyer had not joined the request for a *Bolden* instruction. The trial court dismissed the petition.

After Taylor filed his notice of appeal to the Illinois Appellate Court, the Illinois Supreme Court issued its decision in *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), which invalidated the pattern murder and voluntary manslaughter instructions because, if literally followed by a jury, they would prevent the jury from ever finding that a defendant committed voluntary manslaughter. 123 Ill. 2d at 194-95, 526 N.E.2d at 145. In his appellate brief, Taylor argued that *Reddick* required the court to reverse. The court rejected Taylor's argument, holding that, while *Reddick* would have required reversal on direct review, the case invalidated the instructions on state law rather than on constitutional grounds. Because prisoners may only receive post-conviction relief in Illinois for constitutional error, the court affirmed. (Pet. App. 41-42).

The court also rejected Taylor's Sixth Amendment claim because "[t]he evidence here was very weak that defendant acted with the 'sudden and intense passion resulting from serious provocation by another' " as the voluntary manslaughter law required. (Pet. App. 42 (quoting ICC § 9-2(a)). The court noted that, even by Taylor's own testimony, "his passion was not sudden and the provocation was very questionable." (Pet. App. 42). For these reasons, the court held that it would have been "very unlikely" that Taylor's jury would have found him guilty

of voluntary manslaughter rather than murder even if his lawyer had requested a proper instruction. (Pet. App. 42-43). The Illinois Supreme Court denied Taylor's petition for leave to appeal from this judgment on October 5, 1989.

IV. The Federal Habeas Corpus Proceeding

Taylor proceeded to federal court, filing a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois. The court denied Taylor's petition. The court noted that the Seventh Circuit's recent decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), had held that *Reddick* errors did in fact violate the Fourteenth Amendment's Due Process Clause, contrary to the Illinois Appellate Court's holding in Taylor's state post-conviction proceeding. However, the court held that *Reddick* constituted a "new rule" of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). The court principally relied upon *People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990), in which the Illinois Supreme Court explicitly adopted the *Teague* retroactivity analysis for state post-conviction proceedings and held that *Reddick* announced a new constitutional rule under *Teague*. (Pet. App. 31-32).

The United States Court of Appeals for the Seventh Circuit reversed. The court held, directly contrary to the Illinois Supreme Court's *Flowers* decision (without citing it) and directly contrary to the district court's decision relying on *Flowers*, that *Reddick* did not announce a constitutional rule at all. Rather, the Seventh Circuit found that its own decision in *Falconer* first held that *Reddick* errors violated the Due Process Clause. The court reasoned, therefore, that the appropriate *Teague* inquiry asks whether *Falconer*, not *Reddick*, announced a new rule.

The court held that *Falconer*'s result was dictated by *Boyde v. California*, 494 U.S. 370 (1990), and *Connecticut v. Johnson*, 460 U.S. 73 (1983), and that, as such, it did not announce a new rule under *Teague*. (Pet. App. 21-23).

SUMMARY OF ARGUMENT

In this habeas corpus action, the Seventh Circuit held that jury instructions, which state and federal courts have considered constitutional for over twenty years, violated the Fourteenth Amendment's Due Process Clause because they might have prevented Taylor's jury from convicting Taylor of voluntary manslaughter, a lesser offense provided by state law, as an alternative to murder. The court also applied its due process holding retroactively because it believed that cases from this Court compelled this application of the Due Process Clause. The court was wrong on both points.

Under the Due Process Clause, jury instructions must inform the jury that the state must prove every element of a charged crime beyond a reasonable doubt. The jury instructions used at Taylor's trial met this due process requirement. Although Taylor's instructions violated state law by permitting the jury to find Taylor guilty of murder without considering his affirmative defense (that he at most committed voluntary manslaughter), mere errors of state law do not violate due process.

Many cases that this Court decided before Taylor's conviction became final establish that the Due Process Clause does not require correct jury instructions on affirmative defenses. A number of circuit courts have agreed, and

many state and federal courts have found no constitutional problem with pattern instructions virtually identical to those given at Taylor's trial because of these cases. At a minimum, therefore, the lower court's holding was susceptible to debate among reasonable minds. For this reason, the court erred by applying its holding retroactively to a habeas corpus petitioner.

ARGUMENT

THE SEVENTH CIRCUIT ERRED BY APPLYING ITS HOLDING RETROACTIVELY BECAUSE NO SUPREME COURT PRECEDENT EXISTING WHEN TAYLOR'S CONVICTION BECAME FINAL WOULD HAVE COMPELLED A COURT TO HOLD THAT FAULTY INSTRUCTIONS VIOLATE DUE PROCESS EVEN IF THE JURY WAS CORRECTLY INSTRUCTED ON THE ELEMENTS OF THE CHARGED OFFENSE.

A. Federal Courts Generally Cannot Grant Habeas Corpus Relief Based on New Principles of Law.

On June 4, 1987, the Illinois Supreme Court denied Taylor's petition for leave to appeal from the Illinois Appellate Court's judgment affirming his conviction on direct appeal. (Pet. App. 5). At the latest, therefore, his conviction became final on September 2, 1987, when his time for filing a petition for certiorari to this Court expired. *Cf. Stringer v. Black*, 112 S. Ct. 1130, 1134 (1992) (conviction became "final," for retroactivity purposes, when this Court denied certiorari). On that date, existing precedent from this Court would not have "compelled" any court to find that his murder and voluntary manslaughter jury instructions violated the Due Process Clause; indeed,

if anything, existing precedent compelled the opposite result. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). For this reason, this Court should reverse and hold that Taylor has invoked a new rule.

Unless an exception applies, a federal court cannot grant habeas corpus relief to a prisoner based on a new rule of law. *Teague v. Lane*, 489 U.S. 288, 305-10 (1989) (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989). Although courts may sometimes struggle to determine whether a rule is "new" under *Teague*, this Court has announced a number of principles to guide the *Teague* new-rule inquiry. A decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; *Stringer*, 112 S. Ct. at 1135. The new-rule principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

The question is not, under *Teague*, whether a decision is "within the 'logical compass' of" or whether a decision is " 'controlled' by" an earlier decision. *Id.* at 415. Rather, a federal court must inquire " 'whether a state court considering [the prisoner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the prisoner] seeks was required by the Constitution.' " *Wright v. West*, 112 S. Ct. 2482, 2500 (1992) (Souter, J., concurring) (quoting *Saffle v. Parks*, 494 U.S. at 488). Under these settled principles, the Seventh Circuit erred by holding that Taylor's jury instructions violated the Due Process Clause under an old rule.

B. The Lower Court Announced a New Rule Because Settled Supreme Court Precedent Establishes That Jury Instructions Cannot Violate the Due Process Clause Unless They Prevent a Jury From Considering Evidence Relating to an Element of the Charged Crime.

As *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), made clear, Taylor's conviction violated Illinois law because the jury instructions might have prevented the jury from finding that Taylor committed voluntary manslaughter rather than murder. 123 Ill. 2d at 193-97, 526 N.E.2d at 144-45. *See also Falconer v. Lane*, 905 F.2d 1129, 1136 (7th Cir. 1990). As this Court has "stated many times," however, " 'federal habeas corpus relief does not lie for errors of state law.' " *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, ___ (1990)); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Taylor's habeas corpus petition presents the question, therefore, whether the jury instruction error first identified in *Reddick* violates the Due Process Clause. Contrary to the lower court's holding, the Due Process Clause did not require a state to instruct a jury correctly on manslaughter in a murder case.

It is true that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). For example, a state may not instruct a jury that it must presume the existence of an element of a charged offense from other facts. *Francis v. Franklin*, 471 U.S. 307, 313-25 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 696-704 (1975). Such presumptions violate the Due Process Clause because they risk conviction without proof beyond a reasonable doubt of a fact that a state consid-

ered " 'so important that it must be either proved or presumed.' " *Francis*, 471 U.S. at 317 (quoting *Patterson v. New York*, 432 U.S. 197, 215 (1977)). "[T]he requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring). When a jury must make the momentous choice between guilt and innocence, our Constitution requires strong proof of guilt to protect the innocent.

As this Court has recognized, however, the choice between murder and a lesser offense, such as manslaughter, does not evoke a similar value choice so fundamental to our society as to trigger scrutiny under the Due Process Clause. A fact relevant only to a lesser offense—in this case, sudden and intense passion caused by serious provocation—does not implicate the Due Process Clause because a state has no constitutional obligation to permit defendants to plead and prove affirmative defenses like manslaughter in the first place.

The Court effectively established that the Due Process Clause does not require the states to offer a manslaughter defense in murder cases in *Patterson v. New York*. The defendant argued in *Patterson* that the Due Process Clause prohibited New York from imposing upon him the burden of proving an affirmative defense that would lessen his crime from murder to manslaughter. 432 U.S. at 201. The Court rejected this argument, reasoning that the Due Process Clause does not require state law to offer manslaughter as an alternative to murder, so *a fortiori* it did not require the state to disprove the manslaughter defense. *See id.* at 207-08 ("The Due Process Clause . . . does not put New York to the *choice of abandoning those defenses* . . .

in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment," suggesting that due process did not prevent New York from abandoning manslaughter) (emphasis added).[6] Although this Court has apparently never explicitly stated that an accused has no due process right to a lesser offense instruction even though warranted by state law (see *Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980), leaving the question open), many circuit courts have quite reasonably adopted this position.[7]

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[6] *Accord id.* at 228 (Powell, J., dissenting) ("But nothing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder") (footnote omitted); *McKoy v. North Carolina*, 494 U.S. 433, 450 (1990) (Blackmun, J., concurring) (*Patterson* was premised on the principle that state law need not provide a lesser offense as an alternative to murder); *Medina v. California*, 112 S. Ct. 2572, 2580 (1992) ("The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused"); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (state procedure does not violate due process just because "another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar"); Ronald J. Allen, MULLANEY v. WILBUR, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 Tex. L. Rev. 269, 284-91 (1977) [hereinafter Ronald J. Allen, *Legitimate Intervention*] (*Winship* triggers this greater-includes-the-lesser analysis).

[7] At least four circuits have held or stated that jury instructions can never violate the Due Process Clause merely because they deprive a defendant of a lesser offense as provided by state law. *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir.) (en banc), *cert. denied*, 496 U.S. 929 (1990); *Valles v. Lynaugh*, 835 F.2d 126, 127-28 (5th Cir. 1988); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987) (per curiam); *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976) (per curiam) (dictum). Three other circuits have held that the Due Process Clause generally does not require an instruction on a lesser offense but that failure to give such an instruction might violate due process if it constitutes a fundamental miscarriage of

(Footnote continued on following page)

It would make little sense to reason that the Due Process Clause permits states to abolish the manslaughter affirmative defense altogether, as the *Patterson* Court did, but still hold that when a state nonetheless permits a jury to consider manslaughter, the Due Process Clause requires that it do so with accurate instructions. Such a rule of due process would depend wholly on state law. For example, in *Engle v. Isaac*, 456 U.S. 107 (1982) (which, as the Seventh Circuit conceded below, is "markedly similar" to this case, 954 F.2d at 449 (Pet. App. 15)), the lower court

[7] *continued*
justice under *Hill v. United States*, 368 U.S. 424, 428 (1962). *See Tata v. Carver*, 917 F.2d 670, 671-72 (1st Cir. 1990); *Trujillo v. Sullivan*, 815 F.2d 597, 602-04 (10th Cir. 1987); *Nichols v. Gagnon*, 710 F.2d 1267, 1272 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984).

Although these latter circuits correctly hold that due process generally does not require the giving of a lesser offense instruction, they are wrong to suggest that the failure to give such an instruction, in and of itself, could ever be so fundamentally unfair as to violate due process. The Due Process Clause's fundamental fairness guarantee either requires a state court to instruct a jury on an available affirmative defense when warranted by state law or it does not. "There is, after all, only one Due Process Clause of the Fourteenth Amendment." *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

Only the Third Circuit has grafted the Due Process Clause onto every state law requiring a lesser offense instruction, see *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988), but even that court has recently suggested that *Vujosevic* might no longer be good law. *Geschwendt v. Ryan*, 967 F.2d 877, 884 n.13 (3d Cir.) (en banc), *cert. denied*, 61 U.S.L.W. 3355 (U.S. Nov. 10, 1992).

As one commentator observed after this Court decided *Mullaney v. Wilbur*, "[t]here are cogent reasons to believe . . . that the Court did not intend to constitutionalize provocation." Ronald J. Allen, *Legitimate Intervention*, 55 Tex. L. Rev. at 284 n.82. Among other reasons, such a holding would mark the first time that the Court ever required a certain form of mens rea under the Constitution. "[C]aution suggests awaiting an explicit statement by the Court before concluding that it has decided to take what would be regarded as so major a step." *Id.*

had held that Ohio bore the burden of disproving self-defense under the Due Process Clause because state law imposed that burden and "fundamental fairness and therefore due process require [the state] to meet the burden that it chose to assume." *Isaac v. Engle*, 646 F.2d 1129, 1135 (6th Cir. 1980) (en banc), *rev'd*, 456 U.S. 107 (1982). This Court soundly dismissed that analysis and held that Isaac's jury instructions, although concededly incorrect under state law, did not violate the Due Process Clause. 456 U.S. at 119-21.

As this Court reasoned in *Isaac*, "[a] State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime." *Id.* at 120 (footnote omitted). Even though Ohio indeed intended to require the state to disprove self-defense and Isaac's jury instructions thwarted that intention, the Court refused to find a due process violation unless the aberrant instruction related to an element of the crime. "If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' " *Id.* at 121 n.21 (quoting *Gryger v. Burke*, 334 U.S. 728, 731 (1948)).[8]

Isaac differs from this case in only one small way: the *Isaac* jury instruction error wrongly imposed the burden of persuasion for an affirmative defense on the defendant, while the *Reddick* error in this case potentially removed

[8] Justice Stevens fully agreed with the Court's reasoning on this issue. 456 U.S. at 136-37 (Stevens, J., concurring in part and dissenting in part). Although two members of the Court dissented in *Isaac*, the dissenting opinion does not dispute this holding of the majority. *Id.* at 137-51 (Brennan, J., dissenting, joined by Marshall, J.).

an affirmative defense from the jury's consideration. This distinction cannot have any relevance to a due process analysis, however, because the potential harm to Taylor from the *Reddick* error is no greater than the harm he would have incurred if Illinois law had not provided for an affirmative defense of voluntary manslaughter in the first place.[9]

As Judge Easterbrook has explained in a recent decision addressing the pattern instructions invalidated in *Reddick*: "Federal courts promote justice by ensuring that states respect constitutional rules to which they may be hostile; there is no comparable role in helping states to enforce those rules they have adopted on their own." *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703, 711 (7th Cir.) (Easterbrook, J., concurring), *petition for cert. filed*, 61 U.S.L.W. 3150 (U.S. Aug. 25, 1992) (No. 92-253). Jury instructions, in other words, only raise due process questions when they might prevent the jury from considering evidence relevant to an element of the charged crime:

> Only when the Constitution makes the resolution (in the state's favor) of some particular fact an essential ingredient of criminal condemnation does it make sense to hold . . . that the instructions to the jury must elicit the jury's determination of that item. . . . Whatever federal role there may be in ensuring that the state supply the minimum justification for *some* criminal punishment does not extend to patrolling the details of the offenses states choose to define.

Cole v. Young, 817 F.2d 412, 438-39 (7th Cir. 1987) (Easterbrook, J. dissenting) (footnote omitted).

Any more expansive a reading of the Due Process Clause would open the federal courts to a hornet's nest of state procedural issues; habeas courts would serve as little more than another level of appeal available to prisoners after they exhaust their state remedies. *Cf. Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Brown v. Allen*, 344 U.S. 443, 540-41 (1953) (Jackson, J., concurring). *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). If Taylor's jury instruction error violates the Due Process Clause, it is hard to conceive of a state procedural error that would not. Indeed, the lower court's reasoning would extend to innumerable affirmative defenses defined in innumerable ways by state legislatures. As Judge Posner has written for the Seventh Circuit, "if we must decide whether . . . a lesser-included-offense instruction was correctly refused—how shall we avoid having to determine every other issue of state procedure that might have a bearing on the accuracy of the state court's determination of guilt?" *Nichols v. Gagnon*, 710 F.2d at 1271.

It goes without saying that our federal system requires that some federal interest underlie an extension of the Due Process Clause to a state procedure. Ronald J. Allen, *Legitimate Intervention*, 55 Tex. L. Rev. at 279 & n.62. This Court essentially held in *Patterson* that, while proof beyond a reasonable doubt of the elements of a charged

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[9] The Due Process Clause nonetheless places some outer limits on the states' ability to impose significant criminal sanctions on people when their trials are "inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. at 428. *See generally* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harv. L. Rev. 321 (1980) (*Winship* implies some substantive limit on state criminal law); John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979) (same). This case falls well within the bounds of due process, however; Taylor has suffered no more unfairness than Mr. Isaac and his co-respondents did.

crime was so fundamental to our society that the Due Process Clause required it, proof of affirmative defenses presented no such federal interest. *Patterson*, 432 U.S. at 210 ("Traditionally due process has required that only the most basic procedural safeguards be preserved; more subtle balancing of society's interests against those of the accused have been left to the legislative branch"). By affirming the lower court, this Court would radically retreat from this settled maxim of federalism.

If this argument is even *reasonable—i.e.*, if it could have persuaded reasonable judges at the time Taylor's conviction became final—let alone if it is correct, then the contrary analysis applied by the Seventh Circuit below depends upon a new rule. *E.g.*, *Butler*, 494 U.S. at 415.

The Seventh Circuit held that Taylor's instructions violated the Due Process Clause because a reasonable likelihood existed that Taylor's jury found that he committed murder without considering whether he committed voluntary manslaughter instead. 954 F.2d at 452-53 (Pet. App. 21-23). The court found this holding "compelled" by *Boyde v. California*, 494 U.S. 370 (1990), and *Connecticut v. Johnson*, 460 U.S. 73 (1983). The court fundamentally erred in this analysis. Neither case supports that proposition; to the contrary, both cases are consistent with the contrary, correct principle set forth above.

First, the Seventh Circuit stated that, when reviewing the sufficiency of ambiguous instructions, the court must ask " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in' *an invalid manner*." 954 F.2d at 452-53 (Pet. App. 21) (quoting *Boyde*, 494 U.S. at 380) (emphasis added). In this passage, the lower court misleadingly excluded the last half of the quoted sentence from *Boyde*. The *Boyde* Court actually

held that "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in *a way that prevents the consideration of constitutionally relevant evidence*." 494 U.S. at 380 (emphasis added). An obvious difference exists between "invalid" instructions—by which the Seventh Circuit meant instructions that permitted a jury to find a defendant guilty without considering an affirmative defense permitted by state law—and instructions that relate to "constitutionally relevant evidence." Simply put, heat-of-passion evidence, which is the only evidence that Taylor's jury might not have considered, is not "constitutionally relevant" because an accused has no constitutional right to an affirmative defense instruction. *See supra*, pp. 15-22.

Second, this Court decided *Boyde* more than two years after Taylor's conviction became final. Accordingly, *Boyde* could only have dictated the result below if *Boyde* itself was dictated by a principle existing when Taylor's conviction became final. *Saffle v. Parks*, 494 U.S. at 494. It was not. As the *Boyde* Court itself explained, "[t]he legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases." 494 U.S. at 378. Indeed, this Court stated that its earlier opinions on this issue had "produced a variety of tests and standards," and the Court went to great lengths to comment on the inconsistency of earlier cases to explain why the Court should settle on one specific standard. *Id.* at 378-80. Since this Court decided *Boyde* after Taylor's conviction became final and because earlier cases did not dictate *Boyde*'s holding, *Boyde* could not have dictated the result below.

The lower court also fundamentally erred by believing that *Connecticut v. Johnson* dictated the result below. First, *Johnson* did not even address whether a jury in-

struction error violated the Due Process Clause; the Court's opinion was limited to the issue of whether the instructional error announced in *Sandstrom v. Montana*, 442 U.S. 510 (1979), was subject to harmless error analysis. *Johnson*, 460 U.S. at 81 & n.10.

Second, the instructional error addressed in *Johnson* and *Sandstrom* involved an element of a crime—intent—while a *Reddick* error only prevents a jury from considering evidence of an affirmative defense. The lower court considered this distinction from *Johnson* "insignificant," stating that "[w]hat ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless of whether the evidence related to an element of the crime or an affirmative defense." 954 F.2d at 453 (Pet. App. 23). The *Johnson* plurality opinion, however, suggests otherwise. "An erroneous presumption *on a disputed element of the crime* renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." 460 U.S. at 85 (emphasis added).

Indeed, the *Sandstrom* error discussed in *Johnson* violates the Due Process Clause under *Winship*, which the *Patterson* Court distinguished. *See Sandstrom*, 442 U.S. at 520-24 (relying on *Winship* to find that a presumption that relieves a state from proving intent beyond a reasonable doubt violates due process); *Patterson*, 432 U.S. at 205-11 (distinguishing *Winship*). Because the instructions at issue in *Johnson* involved an element of a crime, the Court had no reason to consider or comment upon whether the same analysis might apply if a mere affirmative defense were at issue. As explained above, the difference between an element and an affirmative defense marks the difference between state and federal constitutional law. *See supra*, pp. 15-22.

The lower court was wrong to hold, therefore, that *Boyde* and *Johnson* dictated the rule applied below. Those cases stand for the now uncontroversial proposition, first established by the cases discussed above, that jury instructions should not permit a state to obtain a conviction without proving its case beyond a reasonable doubt. Taylor's jury instructions did not violate this principle; they required the state to prove every element of the charged crime. At most, the instructions prevented Taylor's jury from accepting his lesser offense theory, which caused him no constitutional harm.

C. The Lower Court Announced a New Rule Because Other Circuit Courts Have Expressly Rejected Its Reasoning.

At least three circuits have properly rejected the reasoning that the court applied below specifically because of *Patterson* and its progeny. Many circuits have also found that the Due Process Clause does not guarantee the right to instructions on a lesser offense even if warranted by state law, a principle that necessarily conflicts with the lower court's reasoning. All these cases establish that the rule announced below is, at a minimum, "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415 (relying on a circuit split as evidence that a rule was new under *Teague*); *see also Saffle v. Parks*, 494 U.S. at 490-91 (looking to "the large majority of federal and state courts that have rejected" a proposed rule as evidence that the proposed rule is new).

The Fourth, Sixth and Ninth Circuits have rejected the reasoning underlying the court's decision below. In *Allen v. Redman*, 858 F.2d 1194 (6th Cir. 1988), for example, the habeas petitioner argued that his state jury instruction on the affirmative defense of insanity was incorrect in that it permitted the jury to convict him of the charged crime without considering his sanity. He argued that the

instruction completely "infected" the trial so as to deprive him of due process. *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (due process requires a new trial when "an ailing instruction by itself so infected the entire trial that the resulting conviction violates due process"). The court rejected his argument, holding that "the language from *Cupp*, stating that the 'resulting conviction violates due process,' brings the analysis . . . back to whether sanity is an element of the crimes involved." 858 F.2d at 1200. Because sanity was not an element of the charged crime, the *Cupp-Boyde* rule did not apply in the petitioner's case. *Id. See also Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987) (confusing jury instructions on an affirmative defense to murder could not violate Due Process).

Similarly, in *Willard v. California*, 812 F.2d 461 (9th Cir. 1987), a case nearly identical to this one, the California Supreme Court had invalidated a pattern jury charge on aiding and abetting because it failed to instruct on specific intent. *Id.* at 463. In holding that the aberrant instruction nonetheless satisfied due process, the Ninth Circuit noted that "due process—independent of state law—does not require that an aiding and abetting charge contain a distinct instruction regarding specific intent." *Id.* Because due process also does not require an instruction on voluntary manslaughter, the lower court's decision in this case conflicts with *Willard*. *Accord Walker v. Endell*, 850 F.2d 470 (9th Cir.), *cert. denied*, 488 U.S. 926 & 981 (1988) (failure to give accurate charge on criminal recklessness was only an error of state law because it did not necessarily relate to an element of a crime); *Kraubert v. Goldsmith*, 791 F.2d 722, 726 n.1 (9th Cir.) (dictum), *cert. denied*, 479 U.S. 867 (1986) (even if instruction violated state law, federal habeas corpus relief only is possible for violations of federal law); *Smart v. Leeke*,

873 F.2d 1558, 1564-65 (4th Cir.) (en banc), *cert. denied*, 493 U.S. 867 (1989) (self-defense instruction could not be unconstitutionally misleading because it did not negate an element of a crime). The similarity between these cases and this one requires this Court to hold that the lower court announced a new rule.

The decision below also conflicts with the many circuit court cases that have held that the Due Process Clause does not require a state court to instruct a jury on a lesser offense when warranted by state law. See the cases cited *supra*, p. 17, n.7. In these cases, habeas petitioners alleged that state trial courts violated the Due Process Clause by not instructing a jury on a lesser offense. Federal courts typically reject these claims because "the Constitution's Due Process Clause does not require a state court to instruct the jury on lesser included offenses." *Perry v. Smith*, 810 F.2d at 1080 (citing *Easter v. Estelle*, 609 F.2d 756, 758 (5th Cir. 1980)). *Accord Bagby v. Sowders*, 894 F.2d at 797; *Valles v. Lynaugh*, 835 F.2d at 127-28; *James v. Reese*, 546 F.2d at 327 (dictum).

The instant case is indistinguishable from these lesser offense cases. At most, a *Reddick* error prevents a jury from considering whether a defendant committed the lesser offense of voluntary manslaughter as opposed to the charged offense of murder. *Falconer*, 905 F.2d at 1136. Given "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge" (*Cupp v. Naughten*, 414 U.S. at 146-47), *Reddick* errors are no different than the instructional errors in these lesser-offense cases.

The lower court's decision conflicts with many other circuit court cases. Accordingly, the court necessarily announced a new rule under *Teague*.

D. State and Federal Courts Have Disagreed Radically on the Constitutionality of the Instructions Invalidated in *Reddick*.

Since *Reddick*, federal and state courts, including the Seventh Circuit as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the Due Process Clause. This fact, too, illustrates a dispute among reasonable jurists and, therefore, the novelty of the Seventh Circuit's decision.

Before the Seventh Circuit decided *Falconer*, many courts held that a *Reddick* error did not violate the Due Process Clause. These courts typically reasoned that, if anything, a *Reddick* error deprived a defendant of an affirmative defense and that the Due Process Clause does not guarantee defendants the right to receive an affirmative defense instruction. *See, e.g., People v. Bolden*, 181 Ill. App. 3d 481, 487-88, 536 N.E.2d 1308, 1311-12 (4th Dist.), *appeal denied*, 542 N.E.2d 116 (Ill. 1989); *People v. Taylor*, 181 Ill. App. 3d 538, 540, 536 N.E.2d 1312, 1313 (4th Dist.), *appeal denied*, 545 N.E.2d 127 (Ill. 1989); *United States ex rel. Fleming v. Gramley*, 735 F. Supp. 302, 305-08 (C.D. Ill. 1990), *rev'd sub nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991). As the *Bolden* court explained, "No United States Supreme Court case has held that due process is denied when an imperfect instruction is given in regard to an included offense." 181 Ill. App. 3d at 487, 536 N.E.2d at 1312. These cases are consistent with the analysis presented in section B, *supra*.

Other courts, however, including the Seventh Circuit and the Illinois Supreme Court, disagreed with this reasoning. These courts held that the *Reddick* court reversed on constitutional rather than state-law grounds even though the instructions related to an affirmative defense. *See, e.g., Falconer v. Lane*, 905 F.2d at 1134 & n.5; *People v. Shields*, 143 Ill. 2d 435, 442-43, 575 N.E.2d 538, 542 (1991); *People v. Flowers*, 138 Ill. 2d 218, 235-37, 561 N.E.2d 674, 680-81 (1990); *People v. Brooks*, 175 Ill. App. 3d 136, 142, 529 N.E.2d 732, 736 (1st Dist. 1988), *appeal denied*, 124 Ill. 2d 557, 535 N.E.2d 916 (1989).

These courts either held or strongly suggested that *Reddick* itself announced a due process holding, because the *Reddick* court considered the jury instruction error to violate a defendant's alleged fundamental right to accurate jury instructions. As the *Falconer* court stated, "[a]lthough the *Reddick* Court itself did not use the magic words 'due process' as the petitioner did, the Court obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude." 905 F.2d at 1134. In *Falconer*, the Seventh Circuit explicitly approved of various Illinois Appellate Court decisions, including *People v. Brooks*, which held that *Reddick* announced a constitutional rule because "[t]he right of an accused to have the State prove all the elements of his alleged crime is incontestably of constitutional dimension." *Brooks*, 175 Ill. App. 3d at 142, 529 N.E.2d at 736 (citation omitted). *See Falconer*, 905 F.2d at 1134 & n.5 (adopting *Brooks* and other Illinois Appellate Court decisions).

As the Seventh Circuit later recognized, however, "an ambiguity exist[ed] as to the precise nature of the due process violation." *United States ex rel. Fleming v. Huch*, 924 F.2d 679, 682 (7th Cir. 1991). In particular, earlier statements in the Seventh Circuit's decisions never explained why *Reddick* errors did not merely violate state law since, at most, they deprived a defendant of his state-law right to present an affirmative defense. As the Illinois Supreme Court declared in support of its decision not to apply *Reddick* retroactively on state collateral review, *Reddick*'s "conclusion did not necessarily flow from the statutory analysis" of Illinois homicide law given *Patter-*

son v. New York. People v. Flowers, 138 Ill. 2d at 240, 561 N.E.2d at 683.

Only in the decision below did the Seventh Circuit finally clarify why it believed that using these instructions violated the Constitution. The court held that constitutional error occurred because a reasonable likelihood existed that the jury might not have weighed evidence that might have supported voluntary manslaughter. 954 F.2d at 452-53 (Pet. App. 21-23).

This novel holding went far beyond the earlier, irreconcilable efforts to resolve this issue by the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district courts in Illinois. Indeed, in *Flowers v. Illinois Department of Corrections*, Judge Easterbrook charged the *Taylor* court with "abandon[ing]" *Falconer*'s holding and substituting a new one, with which he also disagreed. 962 F.2d at 709-12 (Easterbrook, J., concurring). Judge Easterbrook does not even agree that the instructions violate the Constitution. *Id.* Although some panels of the Seventh Circuit believe that *Reddick* errors violate the Due Process Clause, other reasonable jurists do not. Therefore, the lower court announced a new rule. *Butler*, 494 U.S. at 415.

In holding that it had not announced a new rule under *Teague*, the Seventh Circuit effectively declared that Judge Easterbrook's concurrence in *Flowers*, as well as earlier opinions of the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district court, were products of unreasonable jurists. *Butler*, 494 U.S. at 415. This holding cannot stand. These judges did not reach divergent opinions because they were "unreasonable"; to the contrary, the opinions differ because the courts were grappling with how best to apply existing precedent, which does not squarely resolve the

constitutional question presented by these instructions. Accordingly, the lower court's decision presents a quintessentially new rule under *Teague*.

CONCLUSION

The Seventh Circuit erred on many fronts by holding that existing precedent dictated the rule that it announced below. This Court's decisions since *Patterson v. New York* (including *Boyde v. California* and *Connecticut v. Johnson*) suggest that the rule announced below is wrong. Moreover, other circuit courts have rejected the reasoning that the Seventh Circuit applied below. Finally, state and federal courts have disputed the constitutionality of instructions virtually identical to those given at Taylor's trial. For all these reasons, the lower court announced a new rule. This Court must reverse.

Respectfully submitted,

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